

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR 08-076

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-against- :

JOSEPH AGATE, et al., : United States Courthouse
Brooklyn, New York

Defendants. : October 6, 2008
9:30 o'clock a.m.

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TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JACK B. WEINSTEIN
UNITED STATES SENIOR JUDGE

APPEARANCES:

For the Government: BENTON J. CAMPBELL
United States Attorney
BY: ROGER BURLINGAME
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Brooklyn, New York

For the Defendants: Partial List of Attorneys Present:

JAMES R. FROCCARO, ESQ.
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MARK AGNIFILO, ESQ.
Attorney for M. King

1 Defense Attorneys Continued:

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ROSS KRAMER, ESQ.
Attorneys for A. Scibelli

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ELLEN RESNICK, ESQ.
Attorney for L. Filippelli

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SETH GINSBERG, ESQ.
Attorney for W. Scotto

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DOMINIC AMOROSO, ESQ.
Attorney for G. Cracolici

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ROBERT M. BEECHER, ESQ.
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10 Proceedings recorded by mechanical stenography, transcript
11 produced by computer-aided transcription.

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16 THE CLERK: United States versus Agate, et al,
17 criminal cause for hearing.

18

19 THE COURT: I have received a number of letters
20 seeking waivers of the defendant's presence. I have approved
21 them all.

22

23

Is there anybody here without a client who hasn't
submitted a waiver?

24

25

MR. FROCCARO: During his sentencing proceedings you
indicated my client didn't have to appear.

26

THE COURT: Is he waiving?

27

MR. FROCCARO: Yes.

1 THE COURT: Who else?

2 Granted.

3 Who else?

4 MR. AGNIFILO: I haven't submitted a waiver.

5 Mr. King is not here yet. I am waiving his appearance.

6 THE COURT: Granted.

7 MR. AMOROSO: My name is Amoroso. I represent
8 Cracolici, who is here, but the government is not seeking
9 restitution.

10 I am seeking permission to be excused.

11 THE COURT: The government is not seeking
12 restitution against him?

13 MR. BURLINGAME: That is correct, Judge.

14 He pled guilty to a count in which there were no
15 losses.

16 THE COURT: Excused.

17 MR. AMOROSO: Thank you.

18 MS. KELLMAN: Susan Kellman.

19 Good morning.

20 My client did not waive his appearance, but I will
21 waive it. He doesn't appear to have been produced.

22 THE COURT: Waiver accepted.

23 MR. GINSBERG: Your Honor, for Mr. Scotto. I did
24 not waive his appearance but he has not been produced so I
25 will waive it so we can proceed.

1 THE COURT: Waiver accepted.

2 Anybody else?

3 There seem to me to be two central issues here. I
4 have the government's proposed order revised as of
5 October 5th.

6 It will be marked as Court Exhibit 1.

7 (So marked.)

8 We have the Department of Justice letter of
9 October 4th, Court Exhibit 2.

10 October 3rd letter of Brafman, Court Exhibit 3.

11 October 3rd letter of Ryan, Court Exhibit 4.

12 October 3rd letter of Cappello, Court Exhibit 5.

13 October 3rd letter of Fasulo, Court Exhibit 6.

14 October 3rd letter of Protass, Court Exhibit 7.

15 October 3rd letter of White, Court Exhibit 8.

16 October 3rd letter of Shargel, Court Exhibit 9.

17 October 4th letter of Kedia, Court Exhibit 10.

18 October 5th letter of Ginsberg, Court Exhibit 11.

19 October 3rd letter of Benfante, Court Exhibit 12.

20 October 2nd letter of Futerfas, Court Exhibit 13.

21 October 2nd letter of Orden, Court Exhibit 14.

22 October 2nd letter of Welsh, Court Exhibit 15.

23 October 2nd letter of Beecher, Court Exhibit 16.

24 October 2nd letter of Kedia, Court Exhibit 17.

25 October 2nd letter of Ginsberg, Court Exhibit 18.

1 October 2nd letter of DiBenedetto, Court Exhibit 19.
2 September 25th letter of Sheppard, Court Exhibit 20.
3 October 1st letter of Froccaro, Court Exhibit 21.
4 October 2nd letter and brief of Shargel, Court
5 Exhibit 22.

6 October 5th letter of Kellman, Court Exhibit 23.
7 October 2nd letter of Franz, Court Exhibit 24.
8 October 3rd letter of Tacopina, Court Exhibit 25.
9 Those are all the documents.
10 And October 3rd letter of Schein, Court Exhibit 26.
11 October 3rd letter of Cappello, Court Exhibit 27.
12 October 4th letter of Kedia, Court Exhibit 28.
13 October 2nd letter of Kedia, Court Exhibit 29.
14 Some of these may be repetitive.

15 There are two central problems, as I began to say.
16 One, the Local 325 victim, the government contends that there
17 is a restitution obligation of 37,512 jointly and severally
18 against Agate, Dragonetti, Scopo and Scotto.

19 You have a request from the union for that sum,
20 correct?

21 MR. BURLINGAME: That's -- we have the request from
22 the union for restitution. That's what we came up as the
23 appropriate figure.

24 THE COURT: Is there any objection to an order of
25 that amount?

1 MR. CAPPELLO: Thomas Cappello.

2 THE COURT: For?

3 MR. CAPPELLO: Joseph Agate.

4 THE COURT: Yes?

5 MR. CAPPELLO: Your Honor, I submitted two letters
6 on Friday. Initially, this matter was resolved at Mr. Agate's
7 sentence.

8 I indicated in my letter, the government conceded at
9 sentencing that they were not pursuing any amount of
10 restitution. Initially, the PSR indicated an amount of
11 restitution in the amount of \$2,000 for the union that
12 Mr. Mosca allegedly received as some type of payoff. That had
13 nothing to do with Mr. Agate.

14 The government also contended that Mr. Agate owed
15 the union an amount for back dues and for purchasing his union
16 book. I attached to my sentencing memorandum proof of
17 payments, that he paid his union dues up to the date of his
18 arrest in this matter. From that point he was unemployed. So
19 he let the payments lapse.

20 I provided proof that he also paid for the union
21 book seven hundred or so bucks, six hundred maybe, and the
22 government agreed that based on that there were no further
23 grounds for restitution.

24 The Probation Department's recent submission, in
25 fact, doesn't include Agate at all in their breakdown of the

1 restitution amounts. And it wasn't until late Thursday night
2 that I had a conversation with Mr. Burlingame, that I was
3 surprised to find out that now, all of a sudden, they came up
4 with this thirty-seven dollar -- \$37,000 amount, apparently
5 based on 83 percent of Mr. Mosca's salary that was prorated
6 over the time of the conspiracy.

7 If Your Honor is inclined to entertain the
8 application, I would ask for some time to more adequately
9 respond to the government's position.

10 Basically, this matter was finalized. I have
11 the -- my copies of the judgments with me. The defendant
12 actually signed off on it a few days ago when Probation came
13 to his home for his monthly report. Restitution was found to
14 be not applicable in this matter.

15 Additionally, Your Honor did fine the defendant a
16 \$3,600 fine and, notably, waived any interest because of the
17 fact that you found Mr. Agate had no ability to pay. That
18 fine is spread out over a three-year period.

19 If you wish to hear the merits as to the amount of
20 the -- allegedly owed to the union, I would ask for more time
21 to respond.

22 MR. BURLINGAME: Your Honor, there was some
23 confusion in the sentencing of Mr. Agate with respect to this
24 issue. Namely, the government had been -- was remiss in not
25 appropriately assessing the loss, being the loss of Mr. Mosca

1 on the service, which is what was charged in the indictment.
2 And while during sentencing we discussed the potential grounds
3 for restitution as the \$2,000 that was paid for
4 the -- allegedly paid for the union book and potential lost
5 funds, upon doing further research to -- in preparation for
6 this hearing, I think -- the government's submission, we
7 realized that we had not appropriately assessed what the
8 actual loss is to the union for this crime.

9 I don't believe, as Your Honor pointed out, we have
10 the authority to waive restitution where it is appropriately
11 due to the victim. What we have submitted is our best
12 assessment of what the appropriate restitution is for
13 Local 325.

14 THE COURT: You are not including in this 37,000 the
15 union dues and things like that, are you?

16 MR. BURLINGAME: That's correct.

17 THE COURT: You are not including that?

18 MR. BURLINGAME: That's correct.

19 I consulted --

20 THE COURT: What is the basis for the 37,000
21 computation?

22 MR. BURLINGAME: 37,000 is the -- what the loss is
23 to the union as the loss of the union official's honest
24 services. And so what we -- there was a choice between the
25 loss of his services from the point of the crime forward to

1 now or for the duration of the crime. We chose the shorter
2 period. So what we have is that his -- is the percentage of
3 his salary during that -- or the percentage of his yearly
4 salary which is covered by that period.

5 THE COURT: What period?

6 MR. BURLINGAME: The period during which the
7 conspiracy for illicitly selling the book took place.

8 THE COURT: What is the percentage?

9 MR. BURLINGAME: It was 83 percent of his yearly
10 salary.

11 THE COURT: How did you figure 83 percent?

12 MR. BURLINGAME: The ten months over which the
13 conspiracy took place as a percentage of 12 months.

14 THE COURT: So it's total salary for the total
15 period of the conspiracy?

16 MR. BURLINGAME: Correct.

17 THE COURT: Agate is a member of the conspiracy, is
18 he not?

19 MR. CAPPELLO: Judge, he pled guilty to a conspiracy
20 that took place in March of 2006. But he didn't plead to the
21 entirety, from July or September of 2005.

22 But just to put this in context, in October of 2006,
23 Mr. Agate suffered a stroke. As a matter of fact, he was told
24 at that time that he might die, or his family was told that he
25 might die. He was incapacitated. He was disabled through

1 February or March, or late March of 2006, at which time he
2 thought someone was doing him a favor and will help you get a
3 job.

4 That's what he pled to, that he got a job or
5 received membership in the union without doing an
6 apprenticeship program.

7 He could never have foreseen this alleged loss of
8 \$37,000 to the union for Mr. Mosca's deprivation of honest
9 services to the members. As a matter of fact, I think if the
10 Court took that amount and accepted it, it would mean that
11 Mr. Mosca did nothing for ten months other than deal with this
12 conspiracy. Presumably, he continued to work. He continued
13 to keep up with his duties at the union.

14 While Mr. Agate did plead to the conspiracy, when
15 you take the language of what he pled to, his allocution,
16 there is no way that this amount can be tacked on to him, or
17 to his knowledge.

18 THE COURT: What's the government's view?

19 MR. CAPPELLO: If I may also point out, Your Honor,
20 I haven't seen anything from the union reporting a loss. But
21 I do have the government's addendum to the presentence report
22 which I received the date of the sentencing, back in August.
23 The Probation Department reports that Local 325 reported that
24 there is no loss. I don't know if this is just a guesstimate
25 on the union -- on the government's part.

1 THE COURT: What is Local 325 seeking?

2 MR. BURLINGAME: We have just conferred with
3 Local 325. We know that they are seeking, if -- they want
4 restitution. We have --

5 THE COURT: Is this the amount that they want?

6 MR. BURLINGAME: This is the amount that we after
7 consulting with the case law in which this loss of honest --

8 THE COURT: What is the union seeking, is what I am
9 asking you.

10 MR. BURLINGAME: The union has not given us a
11 specific figure that they are seeking. Obviously, we can
12 consult with the union and get back to Your Honor on that.

13 THE COURT: He must have been giving some honest
14 services during this period.

15 MR. BURLINGAME: We were just calculating -- there
16 is case law which we were following in coming up with this
17 calculation which we'd be happy to also supply to the Court.

18 THE COURT: He must have been giving some services
19 in addition to these illicit services.

20 The matter was set for a hearing this morning. I
21 expected evidence.

22 MR. BEECHER: Excuse me, Your Honor.

23 Perhaps I could enlighten the Court. I don't mean
24 to throw a monkey wrench into things. I represent Louis
25 Mosca. The restitution to Louis Mosca is \$2,000, not 37,000.

1 So I think the government's position is some --

2 THE COURT: To Mosca or from?

3 MR. BEECHER: No, to Mosca. This is the gentleman
4 that the government is basing their pro rata 83 percent
5 calculation for.

6 THE COURT: I don't understand what you mean by the
7 restitution to Mosca.

8 MR. BEECHER: The restitution amount attributed to
9 Mr. Mosca is the \$2,000 that was paid to him to deliver the
10 union card to Mr. Agate. That's all the restitution amount
11 attributed to Mr. Mosca. We have an issue with that as well.

12 But it is inconsistent with the \$37,000 which the
13 government is now saying other defendants owe and, of course,
14 the Court is quite correct, during that ten-month period,
15 Mr. Mosca was working continually.

16 The only allegations in the three counts, the only
17 allegation in the three counts that he is charged with in this
18 indictment concern his dealings with Mr. Agate. I think it is
19 a bit confusing, but it is pretty clear, and the union,
20 incidentally, as is correctly pointed out, did not request
21 restitution in any amount. In fact, specifically told
22 Probation, as is reflected by their August 23rd addendum, that
23 they did not suffer damages.

24 I spoke to Cindy Hasner on Friday afternoon before I
25 made my submission.

1 THE COURT: Why didn't you ask the witness to come
2 forward to say that? This is an evidentiary hearing. I am
3 not getting any evidence.

4 MR. BEECHER: Your Honor, on August 23rd, the
5 government through the Probation Department did indicate that
6 the union was not seeking restitution.

7 THE COURT: Excuse me.

8 Whether the union sought restitution or not is not
9 critical with respect to this hearing. Under the statute, as
10 I read it, if the union suffered loss as a result of the
11 conspiracy, restitution has to be ordered by the Court.
12 Whether it goes to the union or some other entity is another
13 problem.

14 If the union suffered no loss, there can't be any
15 restitution.

16 MR. BEECHER: That's precisely correct. In my
17 understanding --

18 THE COURT: I want evidence, sir. The statute
19 requires the Court to grant restitution. I set a hearing this
20 morning to find out what the union suffered in the way of loss
21 so that I can provide for restitution as required by the
22 statute. I am now informed that the government has no
23 evidence --

24 MR. BURLINGAME: Judge --

25 THE COURT: -- and that you have no evidence. I say

1 in respectfully.

2 MR. BEECHER: But for the August 23rd addendum.

3 THE COURT: That is not evidence.

4 MR. BURLINGAME: Judge, the --

5 THE COURT: I am setting a hearing for Friday --

6 MR. BEECHER: Excuse me, Your Honor.

7 I am not going to be here on Friday. I will be out
8 of town.

9 THE COURT: I haven't finished. Why don't you
10 listen?

11 MR. BEECHER: I'm sorry.

12 THE COURT: Five weeks -- two months from today, at
13 10:00 am. What Friday is that?

14 THE CLERK: Five weeks?

15 THE COURT: Make it six weeks. By that time we
16 should have our capital case finished.

17 THE CLERK: November 14th.

18 THE COURT: November 14th, at 10:00 o'clock, there
19 will be an evidentiary hearing, at which time the government
20 will have available evidence, including witness from the
21 union, on the issue of whether the union suffered any loss and
22 how much and who should pay restitution. I can't decide that
23 issue now.

24 MR. BURLINGAME: Judge, we will certainly attempt to
25 do that.

1 THE COURT: You'd better do it. I don't want an
2 attempt. I have ordered you to do it.

3 MR. BURLINGAME: 3664(g)(1) states that no victim
4 shall be required to participate in any phase of the
5 restitution order. We can't force the union to come here
6 since they are the victim of the crime.

7 THE COURT: I am not asking you to force the witness
8 to come here. I am telling you to have the witness here.
9 This is a court order. The witness shall be here.

10 Submit an order.

11 Anybody who doesn't want to be here for that hearing
12 need not be here. You waive your right to be here, and
13 whatever evidence I find requires restitution will be -- make
14 it -- my case coordinator, Ms. Lowe, as you all know, runs
15 these matters, says it's November 14th, at 2:00 pm.

16 So my order is 2:00 pm.

17 Okay?

18 Have the witness here.

19 Does every defense counsel waive the 90-day rule?

20 MR. SHARGEL: Yes.

21 MS. KELLMAN: Yes.

22 THE COURT: They all exuberantly waive the 90-day
23 rule deliberately.

24 Does the government waive the 90-day rule?

25 MR. BURLINGAME: We do, Judge.

1 I think the only one it is immediately pertinent to
2 is Louis Filippelli.

3 THE COURT: No. It is pertinent to Agate,
4 Dragonetti, Scopo and Scotto. Those are the people from whom
5 you are seeking an order --

6 MR. BURLINGAME: Correct.

7 THE COURT: -- for restitution.

8 MR. BURLINGAME: Correct, Judge. Sorry.

9 THE COURT: Those are the only ones I think that are
10 relevant on that point.

11 MR. SHARGEL: On that issue.

12 THE COURT: On the union issue.

13 Now, with respect to JD number four, who remains
14 officially nameless, is he seeking restitution?

15 MR. BURLINGAME: He is, Judge.

16 THE COURT: He is.

17 All right. You will have him here as a witness to
18 show his basis for restitution. I will have evidence on that.

19 MR. BURLINGAME: I would again specifically refer
20 Your Honor to 18 USC 3664(g)(1), which specifically precludes
21 the Court from forcing a victim of a crime to be here to
22 testify.

23 THE COURT: The victim of the crime is well-known.
24 I want him here so that I can get evidence with respect to his
25 loss.

1 MR. BURLINGAME: We certainly are willing to put on
2 evidence with respect to --

3 THE COURT: If you can do it without his presence,
4 that's fine.

5 MR. BURLINGAME: Thank you, judge.

6 THE COURT: He may be in danger.

7 Now, at that time I want briefed the serious issue
8 which I have repeatedly raised and which has not been fully
9 briefed, although I've gotten good briefs to a limited degree
10 on the issue, which I have raised on my own motion repeatedly,
11 of whether JD number four was in fact a member of the
12 conspiracy although not so charged to defraud himself as an
13 agent of the government and somebody who was himself
14 benefiting deliberately from the conspiracy.

15 Since the statute itself is so new, there is very
16 little on it. But there is some legislative history and there
17 is one case, which isn't particularly helpful, but it's the
18 only thing we have at the moment that I am aware of to hang on
19 to. That's United States v Raifler, R A I F L E R,
20 446 F.3d 65, Second Circuit 2006, particularly referring to
21 the problem, page 120 and following, the definition of a
22 victim, a person directly and proximately harmed, which may
23 bed an issue here, was he personally and proximately harmed or
24 benefited by the conspiracy.

25 That has been a problem that has bothered me. I

1 have raised it with the parties and I haven't received a
2 satisfactory response. I don't say that critically. It is a
3 very difficult problem.

4 But I am inclined, based upon the little I know
5 about the case at the moment, not to grant any restitution to
6 number four at all, based on the way I view the statute.
7 However, the question is open. I have an open mind on it.

8 At this hearing I have set I expect full argument
9 and full briefs on the issue.

10 If you want to say anything at this moment, I will
11 hear you.

12 MR. BURLINGAME: Sure, Judge.

13 Obviously, we will take the opportunity to brief the
14 issue more fully. I think it's undisputed that John --

15 MR. SHARGEL: Can you speak a little louder?

16 MR. BURLINGAME: I think it is undisputed that John
17 Doe number four was the victim of each of the extortions to
18 which the defendants pled. So I think it's a strange
19 proposition that he could be a participant in extorting
20 himself.

21 Whether or not he was part of a larger Gambino
22 conspiracy that might have -- that encompassed other
23 instances, other crimes, such as defrauding unions, I think
24 it's in apposite to which these defendants pled guilty which
25 was specifically extorting this victim. And to the extent

1 that the Court would view it as inappropriate for someone who
2 may have benefited through other crimes as part of the same
3 organization as receiving restitution, then John Doe number
4 four would seek in accord with 18 USC 3664 for him to assign
5 his restitution to the victims Crime Victims Fund in the
6 Treasury which could also be an appropriate result if that was
7 the way the Court is leaning.

8 I think that under --

9 THE COURT: Yes, I agree. I am aware of that
10 provision. But we have the preliminary question of whether he
11 is a victim and was harmed.

12 MR. BURLINGAME: I think the short answer is that if
13 he is not a victim, then all of these defendants who have
14 already pled guilty and all the rest who have already -- who
15 have already been sentenced and all the rest who have pled
16 guilty did not plead guilty to a crime because there was no
17 victim.

18 THE COURT: I don't agree with that.

19 MR. BURLINGAME: You can't have a victimless
20 extortion, in other words.

21 THE COURT: I don't agree with that.

22 This is a conspiracy to extort. In a murder case,
23 the defendant may be importuned by the victim, "please shoot
24 me, please kill me." The person who pulls the trigger is a
25 murderer. Whether it's also a suicide or not is a fine point.

1 It might be an interesting first year criminal course
2 discussion. It is a nice problem and I know the government
3 has given a great deal of thought to it and I appreciated your
4 brief and I'll appreciate your further briefing.

5 Is there anybody who doesn't believe it's a problem
6 among the defendants?

7 I really think this is a serious issue which has to
8 be considered. I expect serious consideration by the parties.

9 Is there anything further that you wish to add?

10 MR. SHARGEL: Judge, the only thing that I want to
11 add is that if we get that far, to the point of an evidentiary
12 hearing, we have made an allegation that victim number four is
13 a person who has unclean hands because he was involving
14 himself in criminal conduct under --

15 THE COURT: The unclean hands, you have made that
16 point. But I don't believe that that interesting doctrine of
17 13th century English equity bears when we have Congress
18 adopting a specific statute.

19 So with respect to unclean hands, it is not a very
20 persuasive argument at the moment because we don't have to
21 deliver the money to his unclean hands. We can deliver the
22 money to the victim fund.

23 MR. SHARGEL: We did cite a case from the Eastern
24 District of Virginia that recognized unclean hands and
25 actually ruled on that basis.

1 THE COURT: I understand that.

2 But I am not --

3 MR. SHARGEL: Bound?

4 THE COURT: -- bound or impressed.

5 MR. SHARGEL: I understand that as well.

6 THE COURT: I think we have a really serious
7 statutory problem here. We are not going to dodge it with
8 unclean hands.

9 MR. SHARGEL: May I just say this?

10 If we get to the point of an evidentiary hearing, I
11 think witness should be produced. We would want to elicit
12 information that's relevant to a determination as to
13 whether --

14 THE COURT: Issue a subpoena.

15 MR. SHARGEL: I will do that.

16 THE COURT: There will be a motion to quash. I will
17 decide it.

18 MR. SHARGEL: I will do that.

19 MR. AGNIFILO: Trying to get to the heart of Your
20 Honor's questions, one of the things that we are going to try
21 to explore, and it is hard to explore it without the benefit
22 of discovery, which we don't have because we've all entered
23 guilty pleas, is certain decisions, certain things that John
24 Doe number four did to insert himself and involve himself in
25 many of these transactions. We can guess at certain things

1 that he did, but we don't really know many of --

2 THE COURT: Excuse me.

3 You know everything. You have had the 3500
4 material.

5 MR. FROCCARO: I made a request for it in my
6 submission for the 3500 material including the cooperation
7 agreement.

8 We also need his financial records.

9 THE COURT: Issue a subpoena. There will be a
10 motion to quash.

11 MR. FROCCARO: Judge, we would ordinarily be
12 entitled to that. If they are going --

13 THE COURT: Issue a subpoena. There will be a
14 motion to quash.

15 MR. FROCCARO: Okay.

16 MR. GINSBERG: With respect to Mr. Scotto there is
17 an additional issue. He pled to a RICO conspiracy comprising
18 two racketeering acts, neither of which the government seeks
19 restitution for. The government is seeking restitution from
20 Mr. Scotto for all of the racketeering acts to which anyone
21 pled guilty.

22 THE COURT: I don't think that precludes the
23 government, that he didn't plead guilty to it.

24 What's the government's view?

25 MR. BURLINGAME: That's correct, Judge.

1 He pled guilty to the RICO conspiracy. Under the
2 case law the --

3 THE COURT: Brief it, if you don't think your client
4 is amenable. I think probably he is.

5 MR. GINSBERG: Thank you.

6 THE COURT: Thank you all very much.

7 Yes?

8 MS. RESNICK: As much as it is a pleasure for us to
9 come back to a hearing, on behalf of Louis Filippelli I would
10 like to ask for the Court's consideration as to a particular
11 problem presented by Louis Filippelli who was sentenced before
12 Your Honor on July 8th and as to whom the particular issue of
13 restitution was raised by the Court and the Court made a
14 ruling that there should be no restitution because at that
15 sentencing, as the Court may recall, the government conceded
16 there was no loss.

17 THE COURT: The government has now retracted that
18 concession, right?

19 MR. BURLINGAME: I am not willing without looking at
20 the sentencing minutes to concede that there was such a
21 concession.

22 MS. RESNICK: Your Honor --

23 THE COURT: They are retracting it.

24 They can't make a concession waiving statutory
25 requirements.

1 MS. RESNICK: But the government had the opportunity
2 to ask for the amount of restitution to remain open. There
3 was a decision as to restitution. That decision was a zero
4 because the loss was zero.

5 Under Rule 35(a), there were seven days in which the
6 government had an opportunity to come back and ask for the
7 J and C to be amended. They did not.

8 We don't believe it is fair or appropriate or
9 statutorily or legally permissible at this point for the
10 government on the 90th day to say, wait a minute. It's not
11 zero. The loss wasn't zero. The restitution isn't zero.
12 It's 62.5 thousand.

13 That cannot be. They had the opportunity at the
14 time to ask for restitution. Your Honor made a ruling. There
15 was an amount of restitution. That amount is zero.

16 THE COURT: Okay.

17 MS. RESNICK: We don't think it is the appropriate
18 time to change that.

19 THE COURT: Good argument. Submit your letter, if
20 you don't want to appear at the hearing. I will have to rule
21 on it.

22 MR. SHARGEL: May I clarify one thing?

23 Is the JD number four issue to be heard on the 14th
24 as well?

25 THE COURT: That's the issue, the main issue.

1 MR. SHARGEL: Your Honor put it on for the union
2 issue.

3 THE COURT: For the what?

4 MR. SHARGEL: Your Honor put on the union part of
5 it. I didn't know whether both parts were on.

6 THE COURT: Both.

7 MR. SHARGEL: May I tell you this? I am scheduled
8 to speak at a CLE conference. Is there any way of doing it
9 one week later than that?

10 THE COURT: Sure.

11 Give me the next week, please.

12 I take it, the same waiver applies?

13 MR. SHARGEL: Yes.

14 THE CLERK: 21st.

15 THE COURT: The 21st, 2:00 o'clock.

16 MR. BURLINGAME: Mr. Brownell will not be here on
17 the 21st. I was wondering if you could push it back perhaps
18 one week or forward?

19 THE COURT: One more week.

20 THE CLERK: The week after that is Thanksgiving.
21 That puts us to December 5th.

22 THE COURT: December 5th?

23 MR. SHARGEL: We waive.

24 THE COURT: Everybody waives. Everybody is
25 agreeable. 2:00 pm?

1 THE CLERK: Yes.

2 THE COURT: 2:00 pm. That's December 5, 2:00 pm.

3 MR. BEECHER: One more administrative question, Your
4 Honor.

5 Do you want any defendants who are scheduled to be
6 sentenced prior to this now December 5th hearing to go forward
7 with their sentences prior to the hearing?

8 THE COURT: Yes.

9 Anything further?

10 Thank you very much.

11 (Matter concludes.)

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2 C O U R T E X H I B I T S:

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4 Court Exhibit 1 5

5 Court Exhibit 2 5

6 Court Exhibit 3 5

7 Court Exhibit 4 5

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